of municipal corporations, which JUDGE DENIO opposed. The difference between the conceptions of these two judges and their respective followers is fundamental. On the one hand municipal corporations are regarded simply as agents of the State and nothing more; on the other hand they are considered as existing primarily for the benefit of the separate localities in the State, not simply for the convenience of the State as a whole. By the advocates of this latter view it is said, that, though municipal corporations have no vested rights in governmental powers as against the State, *People* v. *Morris*, 13 Wend., 325 (1835), they are also private corporations, with the rights of private corporations in regard to property and contract rights.

The State, *e. g.*, cannot force them to contract [*quaere*, issue bonds?] any more than it can compel private corporations to contract.

Nor can (*semble*) the State wholly destroy their corporate existence, if their charters, as in the case of the City of the New York, antedate the period when the State reserved to itself the right of charter amendment and repeal.

Hitherto the United States Supreme Court has refused to consider municipal corporations "private" in such a sense that obligations could not be forced on them individually without violating the "due process of law clause" in the XIVth amendment. See *Williams* v. *Egleston*, 170 U. S., 304 (1897), where a town was made to pay the cost of a bridge. It will be interesting to observe what may be held on appeal in a case like *Dunmore's Appeal*, 52 Pa. St., 374 (1866), where the Legislature was allowed to deprive a municipal corporation of the right of trial by jury.

SALES—INSTALMENT CONTRACT—EFFECT OF FAILURE TO PAY INSTALMENT OF PURCHASE-PRICE.—What kind of default by one party to an instalment contract will justify the other in refusing to perform subsequently is a subject on which courts differ. The English doctrine laid down by the House of Lords in *Mersey Steel Co.* v. *Naylor*, 9 App. Cas., 434 (1884), which was a case of a failure to pay an instalment, is that there must be an intention shown by the defaulting party to abandon the contract. In *Norrington* v. *Wright*, 115 U. S., 188 (1885), the Supreme Court declared that failure by the vendor to deliver the first instalment of goods as per contract was ground for repudiation by the vendee, though in that case the vendor had shown his intention to continue performance. This doctrine has been extended to a failure by the vendor to deliver any subsequent instalments. *Cresswell* v. *Martindale*, 63 F. R. 84 (C. C. A., 1894). It is a poor rule which does not work both ways, and, logically, it would seem that the same effect should be given to a failure on the part of the vendee to make an instalment payment. The appropriateness of such a doctrine was well pointed out in the Scotch case of *Turnbull* v. *MacLean*, 1 Session Cas., 4th Series, 730 (1874). In that case the Lord Justice Clerk said (on p.

737): "It is said that the settlement of the price of the November deliveries was a matter altogether apart from the obligation to deliver in December, that the time of the payment was not of the essence of the contract and that, however long the settlement was delayed, the obligation to continue the supply remained. I think this a position entirely untenable. * * * It cannot be said that the time of payment was less of the essence of the contract than the payment itself." Lord Neaves (on p. 739) puts it thus: "In a contract of labor in which monthly payments are stipulated, could it be said that if the servant has not received payments for the last month, that has nothing to do with his obligation to work during the next month? Indeed if one month's pay can be refused, every successive month's pay can be refused. In most of these cases payment for each month is the means for enabling the party to fulfill his contract for the next month."

This sound view obtains in a number of American jurisdictions. *Stokes* v. *Baars*, 18 Florida, 656 (1882), *Moore* v. *Taylor*, 42 Hun, 45 (N. Y. 1886); *Winchell* v. *Scott*, 114 N. Y. 640 (1889); *K. S. Co.* v. *Inman*, 134 N. Y. 92 (1892); *Wharton* v. *Winch*, 140 N. Y. 287 (1893); *The G. H. Hess Co.* v. *Dawson*, 149 Ill. 138 (1894); *Beatty* v. *Howe Lumber Co.*, 77 Minn. 272 (1899); *Faber* v. *Hougham*, 36 Oregon, 428 (1900). In the Federal Courts, however, Mr. Justice Gray's implied approval of the case of *Mersey Steel Co.* v. *Naylor* in his opinion in *Norrington v. Wright* seems to have induced a different theory, and failure to pay an instalment of the purchase-price of goods is not considered a breach which goes to the essence. In the case of the *Cherry Valley Iron Works* v. *Florence Iron Company*, 64 F. R. 569 (C. C. A., 1894), Judge Severens, writing the opinion for the Circuit Court of Appeals for the Sixth Circuit, put the vendor's right to repudiate on the express terms of the contract, and said (on p. 572) that in the absence of such provisions a failure by the vendee to pay "not evincing a renunciation of the contract" is on a different basis from breach by the vendor, and does not discharge the other party from his duty to go on with the contract. He mentions Mr. Justice Gray as recognizing Mersey Steel Co. *v.* Naylor as "authoritative" on that point. The *ratio decidendi* of the latter case was the defaulting party's apparent intention in regard to future performance; in Norrington *v.* Wright this was disregarded. So, although the two cases may be distinguished on their facts,—the former dealing with a breach by the vendee and the latter with a breach by the vendor—they are opposed in theory and it was unfortunate that Mr. Justice Gray treated the Mersey case as he did.

Under the influence of the case of the *Cherry Valley Iron Works* v. *Florence Iron Co.*, the Circuit Court of Appeals of the same circuit has held in a recent case that a vendor will be liable in damages to the vendee in an instalment contract, if, on the vendee's failure to pay instalments without circumstances showing a renunciation of the contract, the vendor ceases to make deliveries. *Monarch Cycle Manufacturing Co.* v. *Royer Wheel Co.*, 105 F. R. 324 (C. C. A., Dec. 4, 1900). Such a result, whilst it follows log-

ically from *Mersey Co.* v. *Naylor*, would hardly seem to be consonant with the reasoning in *Norrington* v. *Wright*; and as it is palpably counter to the intention of the parties to treat such a breach as breach of a mere warranty, it is to be hoped that the Supreme Court will have the question squarely before it, and it will adopt the same rule for instalments of payments as it has for instalments of goods—that time is of the essence.